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No. 80-2175

In the Supreme Court of the United States

OCTOBER TERM, 1980

CONTROL DATA CORPORATION, ET AL., PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether manufacturers of automatic data processing equipment have standing under the Brooks Act, 40 U.S.C. 759, to challenge government procurement specifications for such equipment adopted by the Secretary of Commerce pursuant to that Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	1
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

American Federation of Government Employees, Local 1668 v. *Dunn*, 561 F. 2d 1310 7

Arnold Tours, Inc. v. *Camp*, 400 U.S. 45 ..... 5, 6

Association of Data Processing Service Organizations, Inc. v. *Camp*, 397 U.S. 150 ..... 3, 4, 5, 6

Barlow v. *Collins*, 397 U.S. 159 6

Boston Stock Exchange v. *State Tax Commission*, 429 U.S. 318 9

FCC v. *Sanders Brothers Radio Station*, 309 U.S. 470 6

Gladstone Realtors v. *Village of Bellwood*, 441 U.S. 99 ..... 7, 8

Intercontinental Placement Service, Inc. v. *Shultz*, 461 F. 2d 222 7

Investment Co. Institute v. *Camp*, 401 U.S. 617 ..... 5, 6

Jarecki v. *United States*, 590 F. 2d 670, cert. denied, 444 U.S. 829 7

Page

Cases—(Continued):

Marshall & Ilsley Corp. v. *Heimann*, No. 80-2251 (7th Cir. June 12, 1981) 8

Merriam v. *Kunzig*, 476 F. 2d 1233, cert. denied, 441 U.S. 911 8

Perkins v. *Lukens Steel Co.*, 310 U.S. 113 ..... 7, 10

Reeves, Inc. v. *Stake*, 447 U.S. 429 10

Rhode Island Committee on Energy v. *GSA*, 561 F. 2d 397 8

Rodeway Inns of America, Inc. v. *Frank*, 541 F. 2d 759 7

Schlesinger v. *Reservists Committee to Stop the War*, 418 U.S. 208 9

Simon v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 9

United States v. *Richardson*, 418 U.S. 166 9

William F. Wilke, Inc. v. *Department of the Army*, 485 F. 2d 180 8

Statutes:

Brooks Act, 40 U.S.C. 759 1

40 U.S.C. 759(a) 2

40 U.S.C. 759(b) 2

40 U.S.C. 759(c) 2

40 U.S.C. 759(d) 2

40 U.S.C. 759(f) 2

Page

Statutes—(Continued):

40 U.S.C. 759(f)(2) 2

40 U.S.C. 759(g) 2

5 U.S.C. 702 4

Miscellaneous:

111 Cong. Rec. (1965):

p. 22825 4

p. 28205 5

Exec. Order No. 11717, Section 2, 38 Fed. Reg. 12315 (1973) 2

H.R. Rep. No. 802, 89th Cong., 1st Sess. (1965) 2, 4

Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669 (1975) 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is not yet reported. The opinion of the district court (Pet. App. 33a-40a) is reported at 85 F.R.D. 339.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1981. The petition for a writ of certiorari was filed on June 24, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Brooks Act, 40 U.S.C. 759, is reprinted at Pet. App. 70a-73a.

STATEMENT

The Brooks Act, 40 U.S.C. 759, was designed "to provide for the economic and efficient [procurement] * * * of

automatic data processing equipment by Federal departments and agencies." H.R. Rep. No. 802, 89th Cong., 1st Sess. 1 (1965). To this end the Act centralizes certain decisions about the procurement of such equipment in the Administrator of General Services (see 40 U.S.C. 759(a), (b), (d), (g)), the Secretary of Commerce (see 40 U.S.C. 759(f), (g)), the Office of Management and Budget (see 40 U.S.C. 759(c), (g)), and the President (see 40 U.S.C. 759(f), (g)).

Petitioners, three manufacturers of automatic data processing equipment, sued for declaratory and injunctive relief in the United States District Court for the District of Columbia,[1] challenging Federal Information Processing Standards promulgated by the Secretary of Commerce pursuant to the Brooks Act.[2] These standards, which must be followed by government agencies in their procurement unless the Secretary grants a waiver, specify interface requirements for computers' "peripheral equipment, such as magnetic tape and disk devices * * *" (Pet. App. 8a). The standards are intended to enable the government to use one manufacturer's equipment with another manufacturer's system (see *id.* at 6a) and to permit government agencies to exchange equipment among themselves (*id.* at 8a). Petitioners asserted that the Secretary's adoption of the standards violated the Brooks Act by invading the province of other government agencies (Pet. 4-5; Pet. App. 93a-94a), was insufficiently supported by the administrative record (Pet. 5), and was based on material outside the record that

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[1]Burroughs Corporation, a fourth plaintiff, did not join in the petition for a writ of certiorari.

[2]The Brooks Act authorizes the Secretary "to make appropriate recommendations to the President relating to the establishment of uniform Federal automatic data processing standards" (40 U.S.C. 759(f)(2)). The President delegated his authority to issue such standards to the Secretary. Exec. Order No. 11717, Section 2, 38 Fed. Reg. 12315 (1973) (Pet. App. 79a).

was not made available for public comment (*ibid.*). They alleged that the standards injured them by forcing them to modify their equipment, at considerable expense, if they wished to sell it to the government (Pet. App. 36a).

The district court dismissed petitioners' claims. It held that petitioners lacked standing under *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), because the interests they asserted were not arguably within the "zone of interests protected by the [Brooks Act]" (Pet. App. 38a). The court reasoned that the Brooks Act was "merely designed to establish a more economic and efficient system for procurement of data processing equipment by the federal government" (*id.* at 39a). The court stated that it found "nothing in the [Brooks] Act which implies that it was directly or indirectly designed to afford protection for these plaintiffs. * * * Likewise, * * * its legislative history reveals nothing which would suggest an intent by Congress to protect the interests of these plaintiffs" (*ibid.*).

The court of appeals affirmed.[3] Explicitly adopting an approach to congressional intent that was favorable to petitioners (Pet. App. 24a), the court nonetheless found that a "review of the relevant statutory provisions and legislative history reveals *no* evidence of an intent to protect or benefit" petitioners (*ibid.*; emphasis in original). The court explained that "[t]he Brooks Act resulted from a growing perception that certain trends in [data processing equipment] acquisition and use were leading to 'costly inefficiencies.' * * * To avoid these inefficiencies, Congress established in the Act a coordinated management program directed particularly toward the acquisition of [data processing] equipment. * * * [O]nly one end was sought—

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[3]The court of appeals granted petitioners' motion for a stay of the Secretary's standards pending appeal. On July 2, 1980, this Court vacated the stay. 448 U.S. 909.

lower government * * * costs" (*id.* at 25a-26a). Consequently, the court said, "we cannot find that [petitioners'] interest lies within the zone of interests intended to be protected by the Brooks Act" (*id.* at 27a). The court of appeals therefore concluded that petitioners lacked standing to raise their claims.

ARGUMENT

1. In *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), the Court held that in order to have standing to challenge an administrative action, a party must show not only that it was injured in fact by the action (*id.* at 152) but also that the "interest [it seeks] to * * * protect[] * * * is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" (*id.* at 153).[4]

Petitioners appear to concede that the Brooks Act was not intended to protect the interests they assert and that they are not among the Act's "intended beneficiar[ies]" (Pet. 11). In any event, petitioners point to nothing in the Act suggesting that Congress sought to protect the interests of manufacturers like themselves. Nor do they take issue with the court of appeals' conclusion that the statute and its legislative history contain "*no* evidence" that Congress intended to benefit petitioners.

In fact, the legislative history demonstrates that the Act was a housekeeping measure intended merely to promote "the effective and efficient management" of federal procurement of computer equipment. H.R. Rep. No. 802, 89th Cong., 1st Sess. 2 (1965); see, *e.g.*, *id.* at 1, 23; 111 Cong. Rec. 22825 (1965) (remarks of Rep. Farnum) ("Essentially,

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[4]See also 5 U.S.C. 702, which grants a right of judicial review to persons "suffering legal wrong" because of agency action or who are aggrieved "within the meaning of a relevant statute."

it is an inventory bill which, in addition, provides for coordinating those aspects of management which cannot economically be considered within any one particular agency."); *ibid.* (remarks of Rep. Monagan) (an "attempt to bring efficiency and progress to the operations of our Government"); *id.* at 28205 (remarks of Sen. Jackson) ("[T]his is simply an effort to try to give centralized control to prevent duplication, waste, and inefficiency that has occurred in the use of data processing equipment."); *ibid.* (remarks of Sen. Tower) (The Act "provide[s] for efficient, businesslike, governmentwide, coordinated management of Federal automatic data processing equipment.").[5]

Because they do not, and cannot, contend that Congress arguably intended to protect their interests in passing the Brooks Act, petitioners assert (Pet. 11-13) that the "zone of interests" test allows standing to be conferred even on a party whose interests Congress did not intend to protect. As support for this assertion—which is contradicted by the very language of the test—petitioners rely on *Association of Data Processing Service Organizations, Inc.* v. *Camp* itself, and two somewhat related cases, *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970), and *Investment Co. Institute* v. *Camp*, 401 U.S. 617 (1971). None of these cases supports petitioners' claim that a party may challenge an administrative action even if it is not among those whom the statute in question was intended to protect.

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[5]As the court of appeals remarked, "Congress was determined to obtain an effective * * * interface standard, *despite* [the] * * * possible adverse effects on * * * suppliers such as [petitioners]" (Pet. App. 27a; emphasis added). The court noted that members of Congress were concerned that the industry was deliberately delaying the development of standards because it knew that such a development would adversely affect its interests (*id.* at 27a n.25). This is further evidence that the Brooks Act was not designed to protect petitioners' interests.

These cases involved challenges by banks' competitors to administrative decisions that, the competitors alleged, violated statutes prohibiting banks from engaging in certain non-banking activities. In each case, the Court determined that the statute arguably protected the competitors' interests. In *Data Processing*, the Court explicitly held that the statute in question "arguably brings a competitor within the zone of interests protected by it" (397 U.S. at 156). In *Arnold Tours*, the Court relied on *Data Processing* and held that "[n]othing in [that] opinion limited [the statute] to protecting only competitors [of the sort involved in *Data Processing*]" (400 U.S. at 46). In *Investment Co. Institute*, the Court declared the standing question "foreclosed by *Data Processing* * * *" (401 U.S. at 620; see *id.* at 621). The Court explained that "Congress had arguably legislated against the competition that the [competitors] sought to challenge, and from which flowed their injury" (*id.* at 620), and it rejected Justice Harlan's contention in dissent that the statute in question was not intended to protect the competitors (*id.* at 640).[6] Moreover, in *Barlow* v. *Collins*,

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[6]Some commentators have suggested that *Data Processing*, *Arnold Tours*, and *Investment Co. Institute* should have instead rested on the principle of *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940). See Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669, 1730-1734 (1975). In *Sanders Brothers*, the Court held that a radio station could challenge an agency's decision to grant a license to a competitor even though the station was not among those parties whose interests were protected by the statute in question (see 309 U.S. at 473-476). The Court appeared to reason that the station acted as a surrogate for the unorganized group of radio listeners, who might lack the incentive to raise such a challenge. See *id.* at 473-477. But the Court in *Data Processing* and its progeny did not rely on *Sanders Brothers*, and petitioners do not invoke the *Sanders Brothers* principle. Unlike the statute involved in *Sanders Brothers* (see *id.* at 477), nothing in the Brooks Act or its legislative history suggests the need for enforcement by surrogates. Moreover, the Brooks Act was not intended to protect the interests of some unorganized class of persons unlikely to be able to defend itself in court; the Act was intended to protect the government's own interest in efficiency. If petitioners are allowed to be

397 U.S. 159 (1970), decided the same day as *Data Processing*, the Court treated the question whether the parties challenging the administrative action were "within the zone of interests protected by the Act" as identical to the question whether "[i]mplicit in the statutory provisions and the legislative history [there] is a congressional intent [to] protect the interests of [those parties or] * * * to benefit [them]" (397 U.S. at 164-165). The courts of appeals have consistently interpreted the "zone of interests" test in this way. See, *e.g., Jarecki* v. *United States*, 590 F. 2d 670, 675 (7th Cir.), cert. denied, 444 U.S. 829 (1979); *American Federation of Government Employees, Local 1668* v. *Dunn*, 561 F. 2d 1310, 1312-1313 (9th Cir. 1977); *Rodeway Inns of America, Inc.* v. *Frank*, 541 F. 2d 759, 765-766 (8th Cir. 1976); *Intercontinental Placement Service, Inc.* v. *Shultz*, 461 F. 2d 222 (3d Cir. 1972).

Finally, petitioners merely assert that a party need not be an intended beneficiary of a statute in order to qualify under the "zone of interests" test (see, *e.g.*, Pet. 11, 13); they do not suggest an alternative formulation of the test or any principle that would limit the class of parties injured in fact by an administrative action who would have standing under their approach. It is abundantly clear from this Court's decisions, however, that in the absence of a clear congressional direction, injury in fact, by itself, is insufficient to confer standing. See, *e.g., Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99, 110 (1979).

"surrogates" enforcing the government's own interest in efficiency, it would appear that every housekeeping statute enacted by Congress could be enforced by any affected party. Nothing in *Sanders Brothers*, *Data Processing*, or any other case supports such a result. Potential government contractors, "to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law." *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125 (1940); see pages 9-10, *infra*.

2. Petitioners also contend (Pet. 7-10) that the lower courts have not applied the "zone of interests" test in a consistent fashion. But none of the cases cited by petitioners construes the Brooks Act; so far as we can determine this is a case of first impression. Moreover, petitioners have not shown that the interpretation of the "zone of interests" test adopted by any other circuit would be likely to produce a different result in this case.[7] Indeed, in deciding standing issues arising in comparable contexts, other circuits have made it clear that they would reach the same result as the District of Columbia Circuit did here. See, *e.g.*, *Marshall & Ilsley Corp.* v. *Heimann*, No. 80-2251 (7th Cir. June 12, 1981), slip op. 10-21 (citing District of Columbia Circuit decision in this case); *Rhode Island Committee on Energy* v. *GSA*, 561 F. 2d 397, 402 & n.4 (1st Cir. 1977).

In addition, since the evidence is clear that Congress did not intend to protect petitioners or the interests they assert when it passed the Brooks Act, it is difficult to conclude that any court would find that petitioners are "within the zone of interests protected by" the Act (*Association of Data Processing Service Organizations, Inc.* v. *Camp*, *supra*, 397 U.S. at 156). Thus, even if petitioners are correct in asserting that the lower courts are in "disarray" over the proper application of the "zone of interests" test in other areas (Pet. 8, 15), the Court cannot sustain petitioners' position in this case unless it simply abandons the test—a test that the

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[7]For example, in *William F. Wilke, Inc.* v. *Department of the Army*, 485 F. 2d 180 (4th Cir. 1973), the court held that a disappointed bidder could seek relief on the ground that it would have been successful had another bid not been accepted in violation of applicable statutes and regulations. But the court in that case based its holding on the conclusion that the relevant statutes protected the disappointed bidder's "right to reasonable treatment of [its] bid []" (*id.* at 183). The Brooks Act, in contrast, protects none of petitioners' rights or interests. See also Pet. App. 19a-20a (discussing *Merriam* v. *Kunzig*, 476 F. 2d 1233 (3d Cir.), cert. denied, 414 U.S. 911 (1973)).

Court has recently reaffirmed. See, *e.g.*, *Gladstone Realtors* v. *Village of Bellwood, supra*, 441 U.S. at 100 n.6 (1979); *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 320-321 n.3 (1977); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39 n.19 (1976).

3. Finally, petitioners assert that they should be granted standing because otherwise "no one will be able to obtain judicial review of the Secretary's action" (Pet. App. 13-14). But "[t]he assumption that if [a party] ha[s] no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974). Instead, petitioners and others interested in government efficiency have recourse "to the political process" (*ibid.*; see *United States* v. *Richardson*, 418 U.S. 166, 179 (1974)). For at least two reasons, this is a particularly appropriate case in which to apply these principles.

First, as the court of appeals noted in rejecting petitioners' argument, "[s]ince the passage of the Brooks Act, Congress has maintained its interest in [the Act's objectives]. * * * Congress has been quite zealous in its * * * oversight of the * * * Act. It has held numerous hearings and made voluminous criticisms of the agencies' implementations of the Act's provisions and policies in the years since the Act's passage. We find no reason to assume that these congressional efforts will decrease either in vigor or number" (Pet. App. 26a, 28a-29a; footnotes omitted).

Second, statutes setting the terms under which the government will purchase materials are traditionally "not * * * bestowal[s] of litigable rights upon those desirous of selling to the Government [but] * * * self-imposed restraint[s] for violation of which * * * private litigants [] can[not] complain. * * * Judicial restraint of those who administer the Government's purchasing would constitute a

break with settled judicial practice * * *." *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127-128 (1940). See *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 439 n.12 (1980). The Court should not lightly infer that Congress intended to depart from this tradition, and Congress showed no intention whatever of departing from it when it enacted the Brooks Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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